DELPHI CORPORATION, et al.

EXHIBIT A

MODIFIED BENCH RULING, AMENDING AND SUPERSEDING SEPTEMBER 24, 2009 ORAL RULING

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

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In the Matter of:

	Chapter 11
DELPHI CORPORATION, et al.,	Case No. 08-44481(rdd)
Debtors.	

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United States Bankruptcy Court

One Bowling Green

New York, New York

B E F O R E:

HON. ROBERT D. DRAIN

U.S. BANKRUPTCY JUDGE

Forty-Seventh Omnibus Hearing

Hearing RE: Doc #17767; Aikoku Alpha, Inc. Objection to Notice

of Non-assumption Under the Modified Plan with Respect to Certain Expired or Terminated Contracts or Leases Previously Deemed to Be Assumed or Assigned Under Confirmed Plan

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THE COURT: I have informed the parties that I would give them my ruling today on the objection of American Aikoku Alpha, Inc. to the Delphi debtors' Notice of Non-Assumption of certain contracts or leases which were slated to be assumed or assumed and assigned under the debtors' original confirmed and now superseded plan, including American Aikoku's contract presently at issue. There has been quite a bit of litigation in this Court over the fate of American Aikoku's contract. Although resolution of the issue now before me is relatively simple, it is somewhat complicated by the procedural history of the American Aikoku litigation, which reflects several changes of direction by the debtors during the course of these chapter 11 cases over whether the were proposing to assume or, instead, reject the American Aikoku contract at issue. (Indeed, the present matter before me is no longer premised upon the debtors' decision not to assume the American Aikoku contract but, rather, the debtors' position that the contract should be assigned to their current buyer, but as a postpetition contract with no cure amount.) That history is relevant to the merits

of the present dispute.

The debtors in this case had a number of executory contracts with American Aikoku and proposed in a motion filed in connection with a proposed sale of their "steering and half-shaft business" to an entity named Platinum in late 2007 to assume and assign under section 365 of the Bankruptcy Code an American Aikoku contract to Platinum as part of that transaction. In January of 2008, American Aikoku objected to that proposed assumption and assignment. In fact, it did so twice, in an objection and then in a modified objection to the assumption and assignment in respect of the proposed sale of the steering and half-shaft business. It also responded to a cure notice sent out by Delphi on January 23, 2008 in connection with the proposed assumption and assignment of the contract to the buyer in that proposed transaction.

The parties subsequently negotiated a resolution of that dispute, which was memorialized in a stipulation dated May 28, 2008 that fixed the amount of American Aikoku's cure claim and resolved American Aikoku's objection to the proposed assumption and assignment. The Platinum entity's proposed purchase of the steering and half-shaft business did not close, however, and, consequently, the contract was not at that time assumed and assigned, there being no assignee to assign it to.

Thereafter, the debtors made a motion to modify their chapter 11 plan that in the meantime had been confirmed in this

case, because the proposed investors under that chapter 11 plan also determined not to proceed to close their proposed transaction. And, in connection with that motion, the debtors sought an order providing that certain contracts (including American Aikoku's), which were previously deemed to be assumed or assigned pursuant to that original confirmed Chapter 11 plan, now, under the proposed modified plan, would not necessarily be assumed. That Notice of Non-Assumption was served on American Aikoku on July 2, 2009.

American Aikoku objected to such a result, contending (notwithstanding (a) that the originally confirmed plan in this case contemplated the assumption and assignment of its contract solely under its own terms and was conditioned on, among other things, a multi-billion dollar capital investment by a group of investors who, as noted, did not close that transaction, and, of course, (b) that the sale of the steering and half-shaft business to Platinum that was the basis for the May 28, 2008 stipulation did not occur, either) that the May 28, 2008 stipulation required the debtors to assume its contract under any circumstances involving the sale of the steering and half-shaft business.

That dispute raised a series of issues related to the interpretation of the May 28, 2008 stipulation that originally were addressed in the context of the debtors' determination, based on their changed circumstances (including a mind-boggling

downturn in the global auto business), no longer to assume the American Aikoku contract.

Thereafter, however, the debtors obtained approval of confirmation of their current chapter 11 plan. That chapter 11 plan, which is the chapter 11 plan now in this case, contemplates the acquisition of certain of the debtors' various businesses and assets either by GM, with respect to specific assets, or by a group of the debtors' debtor-in-possession lenders, with respect to certain other assets, or the retention of certain other assets by the reorganized debtors.

Although the Court was still faced with American Aikoku's objection by to the non-assumption of its contract, it became clear at the hearing held on August 17, 2009 that the debtors now proposed to assign the American Aikoku agreement to GM in connection with the present chapter 11 plan. That is, the debtors no longer wanted to reject the American Aikoku contrac.

At first glance, that change of heart by the debtors could well have rendered the dispute between the parties moot in that the debtors would normally have to cure all prepetition monetary defaults or provide adequate assurance of their prompt cure under section 365(b)(1)(A) of the Bankruptcy Code in order to implement such an assumption and assignment, the very result that American Aikoku had sought.

However, the debtors, in connection with the briefing

for the August 17 hearing, contended that, notwithstanding the May 28, 2008 stipulation, which fixed the amount of American Aikoku's cure claim at well over 400,000 dollars, American Aikoku and the debtors had several months before, in January of 2008, agreed to a modified contract covering the same subject matter that superseded the contract referred to in the May 28, 2008 stipulation. And in that agreement, the debtors now contend, the parties agreed that, in connection with any future assumption and assignment of that contract, there would be no cure claim whatsoever.

The debtors, therefore, contend that the parties, by their January 2008 agreement, at this point are not dealing with a prepetition executory contract at all but, instead, are dealing with a postpetition contract governed by the terms of the January 2008 modification and, therefore, that the debtors are free, under the terms of that agreement, to assign that contract to GM in connection with the current confirmed Chapter 11 plan without the need to pay anything to American Aikoku in respect of its prepetition claim.

That is, the issues before the Court have morphed into issues pertaining to the interpretation and effect of the January 2009 modification of the underlying supply agreement and the effect on it, if any, of the subsequent May 28, 2008 stipulation.

Having summarized that procedural background, let me

return, then, to a few fundamental legal points that govern this dispute.

First, it is clearly the case that a debtor in chapter 11 is not authorized to pay prepetition unsecured debt, like that claimed by American Aikoku, unless pursuant to a confirmed and effective chapter 11 plan with two exceptions. The first exception arises only in highly unusual circumstances where the debtor obtains authorization from the bankruptcy court, on notice, to pay pre-bankruptcy unsecured debt, notwithstanding that all unsecured creditors are not being paid, because of the net benefit to the estate of doing so and, in most courts, the necessity to do so to protect the estate from an injury that would be greater than the net adverse effect of paying the debt. See generally, In re Kmart Corp., 359 F.3d 866 (7th Cir. 2004), rehearing and rehearing en banc denied, 2004 U.S. App. Lexis 9050 (7th Cir. May 6, 2004), cert. denied, 543 U.S. 995 (2004).

As the 7th Circuit said in that case, "Pre-filing debts are not administrative expenses; they are the antithesis of administrative expenses. Filing a petition for bankruptcy effectively creates two firms: the debts of the pre-filing entity may be written down so that the post-filing entity may reorganize and continue in business if it has a positive cash flow. Treating pre-filing debts as 'administrative' claims [that is, claims entitled to current hundred percent payment]

against the post-filing entity would impair the ability of bankruptcy law to prevent old debts from sinking a viable firm." Id. at 872.

Nevertheless, the Kmart decision and decisions in this district recognize that under limited and exceptional circumstances, pursuant to section 363(b) of the Bankruptcy Code a court may authorize a debtor to pay prepetition debt outside of a chapter 11 plan -- again, if such payment is necessary to preserve the debtor's business and reorganization and the net benefit of such payment, including the difference between full payment of the claim now versus the alternative of later paying it with "tiny bankruptcy dollars," flows to the debtor's estate. Id. at 872-73. See also In re Chateaugay Corp., 80 B.R. 279, 287 (S.D.N.Y. 1987), and In re Ionosphere Clubs, Inc., 98 B.R. 174, 178 (Bankr. S.D.N.Y. 1989).

In Ionosphere, although articulating the foregoing exception to the general rule that prepetition debts may not be paid outside a plan, Judge Lifland found that the proposed payment was not in fact critical to the debtors' reorganization and withheld authority for it, id. at 178-79, highlighting again that it is extremely unusual to be permitted to pay prepetition unsecured debt outside of a plan and that such payment may be made only after sufficient notice and Court approval is granted on the basis that I've just outlined.

The other way in which prepetition debt may be paid

outside of a plan is specified in Bankruptcy Code section 365(b)(1)(A), which provides that, as a condition to a debtor's assumption of an executory contract, the debtor must cure or provide adequate assurance that it will promptly cure any monetary defaults thereunder, including prepetition monetary defaults. See also South St. Seaport Ltd. P'shp v. Burger Boys (In re Burger Boys), 94 F.3d 755, 763 (2d Cir. 1996).

The debtor's determination to assume and/or to assume and assign an executory contract is expressly, under section 365(a), subject to Bankruptcy Court approval, on notice. The request for such approval starts a contested matter under the Bankruptcy Code. Id. The standard for approving a request to assume and/or to assume and assign an executory contract in this Circuit is set forth in Orion Pictures Corp. v. Showtime Networks (In re Orion Pictures Corp.), 4 F.3d 1095 (2d Cir. 1993), cert. dismissed, 511 U.S. 1026 (1994), where the Second Circuit stated that in deciding such a motion, the bankruptcy court has to determine whether the proposed assumption or assumption and assignment is a proper exercise of the debtor's business judgment. Id. at 1099.

One of the key features of the assumption of an executory contract is, as I noted, the requirement to pay any prepetition monetary defaults. It clearly would not be a good exercise of business judgment to agree to pay prepetition amounts that did not exist or that had been previously waived.

Here, I have already determined as previously stated on the record that, based on my review of American Aikoku's objections to the proposed assumption and assignment of its contract filed in January of 2008, as well as the debtors' response thereto and the stipulation pursuant to which they resolved those issues, entered into on May 28, 2008, the parties resolved a specific objection to a specific proposed assumption and assignment sought pursuant to a specific contested matter, and, therefore, that the proposed treatment of American Aikoku's contract pursuant to the May 28, 2008 stipulation was limited to the assumption and assignment proposed by the debtors at that time -- which, as I've noted, was not consummated.

American Aikoku’s contention that the May 28, 2008 stipulation really was an agreement to treat its contract, under any circumstances, as being automatically assumed and assigned to any future assignee, simply does not fit into the context of section 365 that I've just described. Clearly in the May 28, 2008 stipulation American Aikoku was not agreeing to permit its contract to be assumed and assigned to anyone but was focusing on the specific transaction that had then been noticed by the debtors. And, similarly, the debtors had not agreed to assume and assign the contract under any circumstances, given that they did not have any transaction in mind other than the proposed steering and half-shaft business transaction noticed for approval at the time. In any event,

they did not seek to obtain approval to assume and assign the contract under any circumstances but only, again, in the context of the specific contested matter that was before the Court. The futility of such a request, had it been made, is shown by the debtors' subsequent changes of direction after various proposed transactions fell through only to be superseded by later transactions, until the present transaction with GM.

I simply would not have approved such an open-ended agreement, given that the debtors' business judgment in agreeing to pay in excess of 400,000 dollars of cure costs and create an administrative liability for any breach of the contract post-assumption would not, as a matter of business judgment, be appropriate except in a specific context that the Court could evaluate.

So, for those reasons, I previously determined that American Aikoku's objection to the debtors' July 2, 2009 Notice of Non-Assumption was not well taken and should be denied.

Subsequently the debtors, again, as I noted, in August of this year pointed out that (apparently unbeknownst to the parties who negotiated the May 28, 2008 stipulation and in any event in no way identified in the May 28, 2008 stipulation) Delphi and American Aikoku had agreed, on January 29, 2008, to enter into a new agreement that would supersede and replace the American Aikoku contract, and that such agreement, in addition

to stating that it is "a new agreement between the buyer and seller and supersedes and replaces any prior purchase orders or other agreements between the buyer and seller with respect to the subject matter hereof" also states that "each of the buyer and the seller acknowledges and agrees that any prior purchase orders or other agreements between the buyer and seller, which are superseded and replaced by this purchase order as of its effective date, shall no longer be subject to assumption or rejection under the United States Bankruptcy Code, and the seller hereby waives any right to assert any of the rights incident to assumption or rejection, including but not limited to the payment of cure with respect to any such prior purchase orders or other agreements." I'm reading from purchase order SAG 90 I 2815, dated January 29, 2008, which, again, states on every page that it "changes, amends or supersedes a purchase order now in your possession." That purchase order was sent by Delphi to American Aikoku and is an exhibit in the record of this matter.

Given the existence of that superseding purchase order and the fact that there's no dispute that it was subsequently performed by both parties, it appears to me that both parties are now, under Michigan law, bound by its terms unless they have been subsequently modified. See Kvaerner U.S., Inc. v. Hakim Plast Co., 74 F.Supp.2d 709, 714 (E.D. Mich. 1999). See also Michigan Comp. Law Annot. section 440.22061 (West 2009),

as well as the terms of the purchase order itself, which states that "if seller accepts this contract in writing or commences any of the work or services which are the subject of this contract, seller will be deemed to have accepted this contract."

American Aikoku argued at the August 17 hearing, however, that the May 28, 2008 stipulation revived the executory, prepetition nature of the parties' agreement and recreated or gave new life to Delphi's obligation to cure any prepetition defaults under that agreement, as agreed to by the parties in the stipulation, upon the assumption and assignment of the contract.

The hearing on August 17 was not an evidentiary hearing, and it appeared to me that Delphi's change of course, the procedural change in direction of this matter whereby now the debtors were actually seeking to have the January 29, 2008 purchase order assigned to GM under the present confirmed plan, required that the parties have some additional time to address the issue of the propriety of that assignment without any court approval and the continued validity of the January 29, 2008 purchase order in light of the May 28, 2008 stipulation.

The parties submitted supplemental pleadings on that issue, as requested by the Court. Neither party has raised any evidentiary issue, however, or requested an evidentiary hearing as to the parties' intentions in entering into the May 28, 2008

stipulation in light of the January 29, 2008 purchase order.

So it appears to me that what I have before me is simply a legal issue that should be decided based upon the foregoing basic legal propositions regarding the times when a debtor is authorized to pay prepetition debt, as well as my review of the January 29, 2008 purchase order and the May 28, 2008 stipulation.

Based on my review of those documents and the case law and authorities that I've just described, I conclude that the debtors did not have authority pursuant to the May 28, 2008 stipulation to resurrect the parties' pre-January 29, 2008 contract and agree to pay the prepetition cure owing under that superseded contract. In light of the parties having agreed in the January 29, 2008 purchase order that American Aikoku would no longer be entitled to a cure payment under section 365 and that that contract would no longer be subject to assumption and assignment under section 365 of the Bankruptcy Code, the debtors would not have received authority to "revive" the contract and cure claim even if they had requested it when they submitted the May 28, 2008 stipulation for approval, which, of course, they did not request.

In essence, such an agreement would have been an agreement to pay prepetition debt, and clearly that agreement was not so described in the stipulation or to the Court. The Court did not, therefore, consider whether the debtors met the

difficult burden to obtain authorization to pay prepetition debt outside of a plan or outside of the assumption of a contract under section 365, or whether such agreement would have made good business sense, which it clearly would not.

The contract had previously been modified so that it was now a postpetition contract and the parties had agreed that there would be no cure claim. So, under Kmart, Chateauguay and Ionosphere, the Court would never have authorized the debtors to have entered into the May 28, 2008 stipulation if that would have been its effect. Nor would such a request have met the business judgment test of Orion, as it would never have been a valid exercise of the debtors' business judgment to pay over 400,000 dollars of prepetition debt that it had previously agreed with American Aikoku it didn't need to pay.

Such a transaction would obviously have required notice and a hearing. And, absent proper notice and a hearing, it would be avoidable if the debtors tried to implement it, which, of course, they're not attempting to do. See In Re Roth American, Inc., 975 F.2d 949, 952 n.3 (3d Cir. 1992), as well as section 549(a) of the Bankruptcy Code.

The May 28, 2008 stipulation also makes this point, because the parties stated, on page 7, that "the Debtors are authorized to enter into this stipulation with regards to the claims matters addressed herein, either because the claims involve ordinary course controversies or pursuant to that

certain Amended and Restated Order under 11 U.S.C. §§ 363 502 and 503 and Federal Rule of Bankruptcy Procedure 9019(b) Authorizing Debtors to Compromise or Settle Certain Classes of Controversy and Allow Claims Without Further Court Approval, entered by this Court on June 26, 2007." As I've stated, given that American Aikoku's interpretation of the May 28, 2008 stipulation would have resurrected and required full payment of over 400,000 of prepetition debt, it would not have been an "ordinary course controversy." Moreover, the amended and restated June 26, 2007 order, referred to in the paragraph that I just quoted, states in paragraph 7 that, "The debtors shall not pay any prepetition claims without a separate Bankruptcy Court order."

The May 28, 2008 stipulation did not authorize the payment of a prepetition claim except in the context of an assumption and assignment in connection with the specific transaction contemplated by that stipulation. So it is clear to me that the parties did not intend in the May 28 2008 stipulation to resurrect a contract that had been superseded by the January 29, 2008 purchase order.

It is also clear to me that even if they intended to do so they did not succeed in doing so and could not have succeeded in doing so in that they would not have obtained Court approval to do so if the matter had been properly noticed, which it wasn't.

So, for all of those reasons, I conclude that if the debtors do not presently intend to assume or to assume and assign their rights under the American Aikoku contract, they are not required to do. Further, I conclude that if the debtors intend to assign the contract as set forth in the January 29, 2008 purchase order, they are free to do so without the need to pay any prepetition cure amount to American Aikoku, because that purchase order was not modified by the May 28, 2008 stipulation, and, even if it had been modified by the May 28, 2008 stipulation, which, again, I conclude the parties did not intend to do, the May 28, 2008 stipulation did not suffice as a basis for obtaining Court approval of such an extraordinary transaction resurrecting and requiring the payment of a substantial amount of prepetition debt outside of a plan.

The debtors can submit an order consistent with my ruling.